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No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

and

EARLINE CALDWELL, *et al.*,

and

JANICE ADAMS, *et al.*,

and

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,

and

THE CITY OF ST. LOUIS, MISSOURI,

and

THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, EARLINE CALDWELL, *et al.*

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August 17, 1981

Counter-Statement of the Questions Presented

1. Whether, under controlling Fourteenth Amendment principles as enunciated by this Court in *Brown I* and *II* and their progeny, a finding of present day, unliquidated public school segregation in a state that formerly imposed such segregation pursuant to state constitution, statutes and laws, requires a district court and court of appeals to direct state officials to take all steps necessary to dismantle such segregation and eliminate its vestiges, including the assumption of a proportional share of the costs of the remedy?

2. Whether, upon a finding by the courts below that intradistrict public school desegregation will not alleviate completely the effects of historical, state-imposed segregation, the courts may, in the exercise of their equitable duties to devise remedies that eliminate such segregation "root and branch", direct state officials, who have been adjudicated to be "primary constitutional wrongdoers", to develop plans for the removal of the vestiges of such segregation; and, whether, in any event, the plan-development components of such an order are properly before or ripe for review by this Court?

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BRIEF IN OPPOSITION OF RESPONDENTS, EARLINE CALDWELL, *et al.*

Petitioners, the State of Missouri, et al., seek a Writ of Certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 3, 1980. *Adams* v. *United*

States, 620 F.2d 1277 (8th Cir. 1980), Nos. 79-1468, 79-1470, 79-1471, 79-1477 and 79-1478. Petitions for rehearing and clarification of that judgment and opinion were denied on April 10, 1980. A petition for certiorari, filed by the Adams plaintiffs-intervenors was denied. 101 S. Ct. 88 (1980). Petitioners did not seek review at that time. Petitioners also seek a review of the judgment and opinion of the Eighth Circuit Court of Appeals entered on February 13, 1981, *Liddell, et al.* v. *Board of Education of the City of St. Louis, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735. Petitioners' Appendix (Pet. A-1). A petition for rehearing filed by the Caldwell plaintiffs-intervenors; a stay of the issuance and/or enforcement of the mandate, filed by the State defendants; and leave to intervene for purposes of filing a petition for certiorari, filed by the Special School District of St. Louis County were denied by the court of appeals on March 19, 1981 (Pet. A-25).

Respondents, Earline Caldwell, the St. Louis Branch of the National Association for the Advancement of Colored People, et al., respectfully prays this Court to deny the Petition.

Counter-Statement of the Case

The original complaint in this school desegregation action was filed on February 18, 1972, by the Liddell plaintiffs, black parents of students in the St. Louis, Missouri public schools, on behalf of themselves and others similarly situated. Named as defendants were the Board of Education of the City of St. Louis, its individual members, Superintendent of Schools and district superintendents.

On December 24, 1975, the parties entered into a consent decree. Subsequently, respondents, Earline Caldwell, et al.,

filed objections to the decree and a motion to intervene as plaintiffs. The district court denied the motion on January 23, 1976. On appeal, the United States Court of Appeals for the Eighth Circuit reversed. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976). A petition for certiorari, filed by the Board of Education, was denied by this Court. *St. Louis Board of Education* v. *Caldwell, et al.,* 433 U.S. 914 (1977).

In remanding the case, the court of appeals directed the district court to immediately grant the petition for intervention and ". . . to hear, as soon as possible, any objections to the school board's . . . plan, and . . . require the parties to submit alternative plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term." 546 F.2d at 774.[1]

The court of appeals further suggested that the district court invite the United States Department of Justice and Missouri State Board of Education to intervene, and that a bi-racial citizens advisory committee be created. *Id.*

On remand, the United States did intervene. In addition, the State of Missouri, the Commissioner of Education of the State of Missouri and the State of Missouri Board of Education were made parties-defendant. Adams, et al. and the City of St. Louis also sought and were granted intervention as plaintiffs.

Subsequently, the district court determined that the scope of remand hearings would include (1) the nature and ex-

[1] The court noted that, while it was not addressing the merits of the consent decree, "if the overall plan to be submitted by the Board contains major deficiencies in the areas asserted, the plan will encounter serious constitutional objections." *Id.*, at 773.

tent of the defendants' constitutional violation and (2) if liability was found, the appropriate remedy.[2]

Following trial, the district court issued its opinion, *Liddell* v. *Board of Education of the City of St. Louis*, 469 F.Supp. 1304 (E.D. Mo. 1979), finding that the state-imposed statutory system of racial segregation in the St. Louis public schools had been dismantled.

On appeal, an en banc panel of the Eighth Circuit, in an opinion signed by each member of the panel, reversed. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980). The court held that:

> A careful review of the record and the controlling law, however, convinces us that the district court was clearly in error as to the constitutional requirements imposed on defendants who have formerly discriminated pursuant to state law. It also erred in its evaluation of the extent to which the defendants have met those requirements.

Id. at 1285. The court of appeals found, based upon its independent review of the entire record, that, "[t]he St. Louis Board of Education failed to take effective measures to desegregate the school system in the years immediately following *Brown I* and has subsequently enforced policies with respect to the assignment of students, the transpor-

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[2] A plan for the reduction of racial isolation in the city's secondary schools had been submitted to the district court on February 28 and March 10, 1977. Objections were filed by the parties. A hearing on the plan was held in April, 1977. The district court found that the only aspect of the Board's plan on which there was agreement was that concerning the establishment of certain magnet schools. The district court directed the Board to proceed with implementation of the magnet school component. The court, however, reserved ruling on the remainder of the plan.

Subsequently, the Liddell plaintiffs, Caldwell intervening-plaintiffs and the United States submitted alternative desegregation plans.

tation of students, the assignment of personnel and the construction of school facilities which cannot be reasonably explained without reference to racial concerns and which have contributed substantially to continuing segregation in the school system. *Id.* at 1280. The court further found that "actions of the state and federal governments, have intensified racial segregation in North St. Louis." *Id.* at 1291.

Having concluded that the defendants were liable for constitutional violations having systemwide impact, the court of appeals directed that "[a]n integrated system must be devised and implemented promptly." *Id.* at 1291.[3] The court ordered that "[t]he Board of Education . . . be given the principal responsibility for developing and implementing a comprehensive plan to integrate the school system" (*id.* at 1295), and that "[t]he costs of the plan shall be apportioned among the defendants as determined by the district court." *Id.* at 1295 n.28.

Only the Adams plaintiffs-intervenors sought review of the decision of the court of appeals.[4] Their petition for certiorari was denied. *Adams* v. *United States*, 101 S. Ct. 88 (1980).

Subsequently, on April 28, 1980, the Eighth Circuit issued a supplemental opinion in which it apportioned,

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[3] The court of appeals ordered that the Board be required to submit its proposed plan within sixty days of the issuance of the court's mandate. The plan was to be reviewed by the district court to insure its compliance with the mandate. Implementation of the plan was to commence no later than the beginning of the 1980-81 school year. *Id.* at 1295.

[4] On April 10, 1980, a petition for rehearing, filed by the intervening plaintiff, the City of St. Louis, and a motion for clarification, filed by the defendant, Board of Education of the City of St. Louis, were denied by the court of appeals. Subsequently, the St. Louis Board of Education voted not to seek further review of the decision of the court of appeals.

among the St. Louis Board and State defendants, the attorneys' fees and costs of the appeal. No review of this order was sought by any party.

The St. Louis Board timely filed its proposed desegregation plan. The district court scheduled hearings on the plan to commence on May 12, 1980.

Prior to the scheduled hearings, each of the parties submitted to the district court position papers and proposed orders outlining the relief each sought. The St. Louis Board (supported by the United States) and Caldwell intervening plaintiffs both made claims, *inter alia,* for funding, plan-development and plan-implementation relief against the State defendants. The State defendants' submission included requests that the Board's plan be approved on the following conditions: that remedial programs and magnet schools "not absolutely necessary to desegregation be stricken"; that the United States be held responsible for funding the plan to the same extent as the State of Missouri; that the State Board of Education be ordered to undertake a study and prepare a plan for 1981-82 implementation, combining the separate vocational-technical schools of the City of St. Louis and St. Louis County, in accordance with state statutes and regulations.

On May 21, 1980, subsequent to the hearings, the district court issued its remedial order approving the Board's proposed plan. *Liddell* v. *Board of Education of the City of St. Louis,* 491 F.Supp. 351 (E.D. Mo. 1980). The order directed, *inter alia,* the Board to implement the plan commencing with the 1980-81 school year; the State defendants to pay one-half of the costs of implementation of the plan; the State defendants, United States and St. Louis Board to develop plans including for the (1) voluntary cooperative interdistrict pupil exchanges to assist in alleviating the school segregation in the City of St. Louis [¶ 12(a)]; (2) merger or consolidation of separate vocational programs

operated by the Special District of St. Louis County and the St. Louis Board [¶ 12(b)]; (3) interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.[5]

On June 2, 1980, the district court filed supplemental findings of fact and conclusions of law in support of its May 21, 1980 order. 491 F.Supp. at 355.

On June 27, 1980, the district court entered two orders: granting (1) a motion by the Caldwell intervening-plaintiffs for leave to file, pursuant to Rule 15, F.R.Civ.P., a supplemental complaint to conform with the evidence against the State defendants; and (2) motions filed by the Caldwell intervening-plaintiffs, the United States and St. Louis Board to add as additional parties-defendant, the Governor, Attorney General and Treasurer of the State of Missouri, for the purpose of having before the Court all parties necessary for complete relief.

Four parties appealed from various aspects of the district court's May 21, 1980 order; the State defendants, Adams, Caldwell and Liddell plaintiffs. On February 13, 1981, the Court of Appeals for the Eighth Circuit issued its order affirming, in all respects, the district court's order. *Liddell* v. *Board of Education of the City of St. Louis*, Pet. A-1. On March 19, 1981, the appellate court issued an order in which it denied rehearing of its February 13 order and a motion for a stay of the issuance of the mandate and enforcement of paragraphs 12(a), (b) and (c) of the district court's May 21, 1980 order pending the filing of the within petition for a writ of certiorari. Pet. A-25.

On June 17, 1981, this petition for a writ of certiorari was filed by the State defendants.

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[5] The ¶ 12(c) reporting requirement was terminated by the district court on June 23, 1981. All other requirements under ¶ 12(c) had been suspended April 1, 1981.

Reasons for Denying the Writ

1. The Record Evidence Overwhelmingly Supports the Lower Courts' Findings as to the Constitutional Inadequacy of the St. Louis Board's 1954-1956 "Desegregation" Plan; the Primary Role of the Petitioners' Constitutional Liability for Failing to Assume Their *Brown I* and *II* Obligations and Thereafter, Exacerbating Unremedied Public School Segregation; and the Remedial Order Including the Requirement that Petitioners Pay One-Half of the Costs of the Remedy.

a. Petitioners argue that the court of appeals erred in determining that the plan for desegregation adopted on June 22, 1954, by the St. Louis Board of Education did not effectively dismantle the prior state-imposed racially dual system of schools. The basis of the court's error, according to petitioners, is its use of 1962 racial data which revealed that all of the twenty-eight elementary schools which had been all black in 1954, remained all or virtually black in 1962, and fifty of the formerly all white schools remained 85% or more white in 1962. 620 F.2d at 1291. Petitioners assert that, rather than demonstrating the lack of effectiveness of the St. Louis Board's 1954 plan, the 1962 statistics actually are evidence of the massive demographic shifts occurring in St. Louis in that period.

This claim, raised for the first time in the current effort by petitioners to obtain review, is without factual or legal basis. The petitioners did not seek review from the court of appeals' 1980 order reversing the district court's finding of no constitutional liability of either the St. Louis and State defendants for the unliquidated dual system of public schools extant in the district at the time. 620 F.2d 1277 (8th Cir. 1980).

Moreover, contrary to the petitioners' assertion, the court of appeals' analysis of the effectiveness of the St. Louis

Board's 1954 plan is neither "hasty" nor "shallow" (Pet. 11), nor was the court's finding, that the plan did not meet *Brown* requirements, based solely on the 1962 racial statistics. Rather, the court below acknowledged that "there are few exact figures for the period immediately following implementation because the Board of Education kept no records of school racial composition." *Id.* at 1284. Nevertheless, the court conducted an independent review of the entire record, including the Board's 1954-56 plan, and concluded that "all the available data demonstrates that little desegregation actually occurred in 1954-56." *Id.*

The court found that the heart of the Board's plan was a "neighborhood school policy", *id.* at 1881, whose zones were nearly identifiable with racially identifiable neighborhoods. *Id.*

Any desegregative assignments that might have occurred under the 1954-56 plan were minimized, if not completely negated, by the availability of a "continuation transfer" that allowed a student, formerly enrolled in a segregated school but not resident in that school's new zone, to remain in his/her former school until graduation, unless the school was overcrowded.[6]

Additionally, the court found that the Board's 1954-56 plan left virtually undisturbed the segregative pattern of staff assignments extant in the district at the time of *Brown*. The court noted that "[of] twenty-eight pre-*Brown* black schools still in existence in 1962, twenty-six had faculties that were 100% black. The other two were Sumner High

[6] The Court, relying on a report, prepared by the Office of the Superintendent of Public Instruction in 1956, concluded that it was the district's intent and purpose to "freeze the (segregated) status quo of the district rather than to implement a desegregation plan. That report stated that when the 1954-56 plan was implemented, the school attendance zones were drawn so as to 'relocate the smallest possible number of pupils.'" *Id.* at 1286-87.

School (98.7% black) and Henry Elementary (82.8% black). Moreover, those formerly white schools that changed student racial identity between 1954 and 1962 tended to change faculty racial identity as well." (*Id.* at 1285).[7]

These findings, as well as controlling legal standards, are ignored by the petitioners who fail to cite any applicable doctrine of this Court (or even a court of appeals) with which the decision below is in conflict.[8] For example, the petitioners submit that the Board "establish[ed] procedures

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[7] As with student assignments, the Board's plan was not designed to have any significant effect upon the segregated personnel assignments. The post-*Brown* policy of the Board provided: "Whenever possible, both teaching and non-teaching employees will retain their present assignments." As the court of appeals found, "[p]reservation of the status quo, obviously, meant preservation of a segregated system" *Id.* at 1287. Such segregative staff assignments in a system with a history of segregation are of probative value in determining whether the district has effectively dismantled its former dual schools. "[W]here it is possible to identify a 'white school' or 'black school' simply by reference to the racial composition of teachers and staff . . . a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

[8] The petitioners' attempt to undercut the court of appeals' use of available statistics only buttresses the court's ultimate conclusion that the Board's plan was constitutionally inadequate. For example, petitioners note that 40% of the black students assigned to new schools chose to attend the previously all black high schools. Pet. at 9. They infer that the absence of whites in these schools was not a result of the redrawing of attendance zones for the formerly black high schools, which, while heavily black, were racially mixed, but rather can be "accounted for by the continuation option." (*Id.*) Petitioners miss the point. The continuation option permitted students to remain in their former, segregated schools. Such "freedom-of-choice" devices are an unacceptable response to the *Brown II* mandate. *Green* v. *County Board of Education of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968) (rejecting a "free transfer" plan, identical to that implemented by the St. Louis Board in 1954-56).

to ensure that students would be admitted to schools on a racially nondiscriminatory basis [and] that this policy . . . [led] to a substantial degree of racial mixture." Pet. 10. The petitioners provide no objective evidence supporting their claim of "substantial degree of racial mixing." And indeed, none exists. Nor do they provide any data, beyond mere speculation, for their contention, in any event irrelevant, that resegregation would have occurred by 1962 even if the defendants had taken affirmative action to desegregate the system. In any event, the duty of the St. Louis Board (and the petitioners themselves) was not simply to abandon its previous segregative policies and practices, but rather affirmatively "to take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board*, 391 U.S. at 437-438, *also see, Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28; *Keyes* v. *School District No. 1, Denver*, 413 U.S. at 200-201 n.11; *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 459 (1979); *Dayton Board of Education* v. *Brinkman (Dayton II)*, 443 U.S. 526, 538 (1979). The test of the Board's plan, therefore, was not simply whether it was facially neutral, as petitioners contend, but rather its effectiveness in dismantling the segregated public schools of St. Louis. *Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971).[9]

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[9] The petitioners' attempt to infer that what the court of appeals was requiring was a "particular racial balance" in the schools and "yearly adjustments" of attendance zones, (Pet. 9-10) is incorrect and misreads this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra* and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). In *Swann*, this Court approved the use of mathematical ratios as a useful starting point in shaping a remedy, rather than an inflexible requirement. *Id.* at 25. *Swann's* significance for the within case, however, which petitioners overlook, is its presumption against schools that are substantially disproportionate in their racial composition, and the

Here, there have been specific findings by the appellate and district courts that the defendants in this action, including the petitioners, "never took any effective steps to dismantle the dual system [the petitioners] had compelled by constitution, statutory law, practice and policy." 491 F. Supp. at 357. These findings are amply supported by the entire record, including but not limited to the 1962 racial statistics to which reference is made by the petitioners, as well as the controlling law. Further, it should be clear that petitioners' claim ultimately seeks dismantlement of an ongoing desegregation plan, one which they failed to challenge in this Court when it was put into effect, although they had ample opportunity to do so. Apart from a lack of merit of petitioners' claim this Court should exercise its discretion to deny a claim that would disrupt implementation of a desegregation plan.

b. Nor do petitioners' claim that the holding of state liability was incorrect, present any issue worthy of review. Their contention that it was not until after the district court entered its remedial opinion that they first had knowledge of the claims against them is simply not true. As early as the court of appeals' 1980 decision reversing the district court on the question of the constitutional liability of the St. Louis and State defendants, the petitioners were put on notice that the case was about an unliquidated dual system of public schools in St. Louis, and the petitioners' failure to assume their affirmative ob-

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burden on school authorities to show that school assignments under a plan are truly nondiscriminatory. *Id.*

Nor does *Pasadena* provide support for the petitioners' position. Unlike the situation in *Pasadena*, the courts below, specifically found that the St. Louis Board had never satisfied its *Brown II* affirmative duty and that post-*Brown* changes in the racial composition of the district's schools "were caused by segregative actions chargeable to the defendants." *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 435.

ligation to dismantle, and actions in exacerbating, that system. Moreover, prior to the May 12-16, 1980 hearings on the St. Louis Board's proposed desegregation plan, both respondents and the Board filed separate memoranda on the remedial obligations of the petitioners. The submissions contained requests for specific relief against the petitioners based upon their adjudged role as a constitutional wrongdoer. These claims were fully litigated during the hearings. Subsequently, the district court made independent findings of liability against the petitioners. 491 F.Supp. at 357. Those findings were affirmed by the court of appeals. Pet. A-22-23.

In the alternative, petitioners argue that, in any event, they have engaged in no constitutional violation because after *Brown* they repealed all state statutes requiring segregation and established an administrative remedy. (Pet. 16-17)

This argument erroneously assumes that Fourteenth Amendment liability may be premised only on some overt act of a state entity or agent. This Court, however, has made it abundantly clear that *Brown* and its progeny impose an affirmative duty to desegregate. "If school authorities *fail* in their affirmative obligations under these holdings . . . judicial authority may be invoked." *Green* v. *County School Board*, 391 U.S. at 438; *Columbus Board of Education* v. *Penick*, 443 U.S. at 459 (1979), *quoting*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971).

Nor may petitioners attempt to evade *their* constitutional obligations with claims that they delegated to local entities the responsibility to comply with *Brown* and assumed compliance had been achieved. "[T]he commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among

various agents." *Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1958).[10]

Alternatively, petitioners contend that, even assuming their liability, it was error for the courts below to require them to pay one-half the costs of St. Louis desegregation. But the only reason suggested by petitioners is that they "are in a better position than the district court to make a judgment as to how that obligation can best be met." Pet.-19.

Here, the petitioners have been adjudicated to be "primary constitutional wrongdoers". 491 F.Supp. at 357. Precedential decisions of this Court support the authority of the district court to direct petitioners' full involvement in the remedy, including the payment of a share of the costs thereof, to determine the amount of the share, and to order all necessary relief to remedy "the condition that offends the Constitution." *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267, 282 (1977).

Petitioners make no claim that the St. Louis remedy exceeded the scope of the violation found. Nor have they presented any evidence supporting an abuse of discretion of the lower courts in apportioning the costs of implementation equally against the St. Louis Board and petitioners.[11]

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[10] Nor do the petitioners make any mention of the evidence in the record and findings of the courts below of their *active* role in exacerbating the public school segregation they initially mandated and later ignored. Among these findings were specific findings of state laws and policies mandating discrimination in housing, 620 F.2d at 1291, *summarizing findings in*, 469 F.Supp. at 1304.

[11] The apportionment of such costs directed by the district court is consistent with that ordered by courts in other school desegregation cases. *E.g.*, *Milliken II*, 433 U.S. 267 (1977); *Reed* v. *Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980); *Penick* v. *Columbus Board of Education*, —— F.Supp. —— (S.D. Ohio January 8, 1981), *Oliver* v. *Kalamazoo Board of Education*, 368 F.Supp. 143 (W.D. Mich. 1973); *aff'd*, 508 F.2d 178 (6th Cir. 1974), *cert. denied* 421

2. Based Upon the Entire Record, the Findings of the Lower Courts and Applicable Constitutional Standards as Set Forth in *Milliken I* and *II* and *Hills* v. *Gautreaux*, the Paragraph 12 Provisions of the Remedial Order Do Not Exceed the Scope of the Petitioners' Adjudicated Constitutional Violation; and, in Any Event, the Issues Raised by the Petitioners, Concerning These Plan-Development Provisions, Are Neither Properly Before, Nor Ripe for Review by This Court.

a. The petitioners' challenge to the plan-development provisions of Paragraph 12 (a), (b) and (c) of the district court's May 21, 1980 remedial order is both premature and ill-founded. 491 F.Supp. 353. The provisions of Paragraph 12 focus largely on voluntary, cooperative efforts to alleviate the lingering effects of state-imposed segregation within the St. Louis schools.

Specifically, paragraph 12(a) requires development and implementation of "a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which will also insure that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353.

The petitioners' claim is that the relief required thereunder is barred by *Bradley* v. *Milliken, (Milliken I)*, 418 U.S. 717 (1974), because there has been no finding of a constitutional violation against any suburban district.[12]

U.S. 963 (1975); *also see, U.S.* v. *Board of School Commissioners of Indianapolis*, 456 F.Supp. 183 (S.D. Ind. 1978), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 49 U.S.L.W. 3247 (October 7, 1980), *Evans* v. *Buchanan*, 447 F.Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, 446 U.S. 923, *reh. denied*, 447 U.S. 916 (1980); *U.S.* v. *State of Missouri*, 363 F.Supp. 739 (E.D. Mo., 1973), *aff'd in relevant part*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

[12] As noted in the text above, the district court acknowledged the absence of any suburban district in the litigation. Moreover, the district court has subsequently issued a protective order direct-

This argument entirely misconstrues the scope and character of the paragraph 12 relief.

Unlike *Milliken I*, paragraph 12(a) of the district court's remedial order does not contemplate the mandatory involvement in remedial efforts of any suburban district or, indeed, of any student. The provision requiring the development of voluntary, interdistrict pupil exchanges, is directed solely to the petitioners, and "will not necessarily entail coercion of uninvolved governmental units because [the state] has the authority to operate outside the [St. Louis] city limits." *Hills* v. *Gautreaux*, 425 U.S. 284, 298 (1976). The nature and extent of the relief ordered pursuant to paragraph 12(a) is not distinguishable from that ordered in *Gautreaux*. In *Gautreaux*, the Department of Housing and Urban Development was a proven constitutional violator. Here, it is the state. In *Gautreaux*, HUD was directed to participate in a remedy within the limits of its jurisdiction which extended beyond the City of Chicago. Here, the petitioners have been directed to participate in a remedy designed to do no more than cure the effects of intradistrict violations within the limits of their jurisdiction which unquestionably extends beyond the city limits of St. Louis.

It is undisputed that the vestiges of over a century of state-imposed, statewide segregation have not been eradicated in St. Louis. Paragraph 12(a)'s requirement that the petitioners "make every feasible effort to work out with the appropriate [suburban] school districts . . . a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St.

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ing that the participation of any suburban district in any voluntary interdistrict plan of desegregation pursuant to paragraph 12, would not waive the rights of such party to resist or defend against any order or claim against it for mandatory participation. Motions to amend the complaint to add parties have been filed by the St. Louis Board and Caldwell plaintiffs, but have not been ruled upon.

Louis . . ." violates none of the principles of either *Milliken I* or *Gautreaux*. The provision is directed at the *state's* unremedied violation. Moreover, it is consistent with this Court's requirement that "all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971), *quoted in*, *Hills* v. *Gautreaux*, 425 U.S. at 297. The district court has the power to order a voluntary plan.

Such provision are standard. Under paragraph 12(a), any suburban district that the state cannot compel to participate in refusing segregative interdistrict transfers from St. Louis can be enjoined to do so by the district court entirely without regard to whether there has been an interdistrict violation. The provision is consistent with a court's "duty . . . to grant appropriate relief." *Hills* v. *Gautreaux*, 425 U.S. at 297.

Paragraph 12(b) contemplated a merger or consolidation of the separate vocational programs operated by the St. Louis Board of Education, and St. Louis County. Subsequently, a number of the parties agreed to a plan for the desegregation (but not merger or consolidation) of these programs, and the district court approved this settlement in a June 11, 1981 order. Pet. A-65. The petitioners, of course, may appeal the June 11, 1981 order, but the proper forum is the court of appeals, not this Court.

Paragraph 12(c) requires petitioners to develop a "suggested" interdistrict plan "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." Such a plan concededly cannot be ordered into effect in the absence of affected suburban districts and the adjudication of an interdistrict constitutional violation. As the petitioners note, the filing dates required pursuant to the provision have been temporarily suspended and reporting dates have been terminated. Thus, the issue itself is not even ripe for review at this time.

CONCLUSION

For all of the reasons herein, respondents respectfully submit that the petition for certiorari be denied by this Court.

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CERTIFICATE OF SERVICE

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